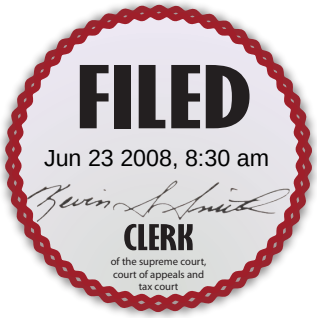

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IN THE COURT OF APPEALS OF INDIANA

HAROLD A. POWERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 16A01-0801-CR-13
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DECATUR CIRCUIT COURT
The Honorable John A. Westhafer, Judge
Cause No. 16C01-0702-FB-42

June 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Harold Powers appeals following his conviction, pursuant to a guilty plea, for Class B felony Burglary,[1] for which he received a fifteen-year executed sentence in the Department of Correction. Powers's challenge upon appeal is to his sentence. We affirm.

FACTS AND PROCEDURAL HISTORY

According to the probable cause affidavit and witness statements, which Powers refers to in describing the facts at issue,[2] on February 18, 2007, at approximately 2:00 a.m., Powers broke a window and entered a residence at 503 North Michigan Avenue in Greensburg while the residents were inside sleeping. Powers, who was intoxicated at the time, also broke a window in the garage. Powers took batteries from the residence and a radar detector from a vehicle parked at the residence.

On February 19, 2007, the State charged Powers with burglary and alleged that he was a habitual offender.[3] On October 15, 2007, Powers entered into a plea agreement whereby he agreed to plead guilty to the burglary charge, and the State agreed to dismiss the habitual offender enhancement as well as two pending criminal charges, one of which involved an alleged felony. As an additional term of the plea agreement, the State indicated its intention to recommend an executed sentence of fifteen years based upon Powers's criminal history

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[1] Ind. Code § 35-43-2-1(1)(B) (2006).

[2] The record does not contain a transcript of the guilty plea hearing.

[3] The charging information alleging Powers to be a habitual offender is not in the record. The CCS refers to the habitual offender enhancement filing, and Powers does not dispute its existence.

and his commission of the offense while on parole. Following a November 15, 2007 sentencing hearing, the trial court sentenced Powers to the recommended fifteen-year executed sentence based upon the aggravator of his criminal record, which the court determined greatly outweighed the mitigator of his guilty plea. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Powers challenges his sentence on a number of grounds. Although Powers frames his entire argument by alleging that his sentence was inappropriate, his individual claims largely challenge the trial court's consideration of and alleged lack of consideration for certain factors. We therefore apply the standard of review outlined in *Anglemyer v. State* (*Anglemyer I*), 868 N.E.2d 482 (Ind. 2007). Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Id*. at 490. Trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. *Id*. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id*. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*. A trial court may abuse its discretion if it fails to enter a sentencing statement at all. *Id*. A trial court may also abuse its discretion if it explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for

consideration, or the reasons given are improper as a matter of law. *Id*. at 490-91. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record. *Id*. at 491.

In sentencing Powers, the trial court stated the following:

> I understand everybody's motivated today to do something about [Powers's] substance abuse problems. And unfortunately, I think the motivation is because [Powers] finds himself today situated in the proverbial between a rock and a hard place. When he was out of jail, nothing was done. This has gone on for years. You know, frankly, I think the people of this county are entitled to some relief from, from Artie Powers. People shouldn't wake up in the middle of the night in their bedroom and find him standing there. Well, the only mitigator I can see in this case is the fact that he has finally entered a guilty plea and, I suppose, saved the State the time and expense of taking him to trial. But his, his criminal record far outweighs any mitigator. So, the Court will sentence Mr. Powers today to imprisonment for a determinate period of fifteen years. He'll be given credit for two hundred and seventy-one actual days in confinement plus good time. And he'll be remanded to the custody of the Sheriff for commitment to the Department of Correction.

Tr. p. 29-30.

Powers first claims that the trial court abused its discretion by failing to consider as mitigating factors his willingness to provide restitution and the fact of his impairment at the time of the offense. "'If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist.'" *Id.* at 493 (quoting *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993)). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. *Anglemyer v. State* (*Anglemyer II*), 875

N.E.2d 218, 220-21 (Ind. 2007).

We conclude that the trial court did not abuse its discretion by failing to mention Powers's willingness to provide restitution, because this mitigator was not demonstrably significant. The trial court was within its discretion to conclude that Powers's burglary, during which he entered the victims' bedroom while they were sleeping at 2:00 a.m. and took objects of minimal value, caused more damage to the victims' sense of security than to their financial well-being, and that his willingness to provide restitution was therefore not a significant mitigating factor worthy of mention.

With respect to Powers's impairment at the time of his offense, the trial court specifically rejected this proffered mitigating factor by reasoning that whether or not Powers's actions were due to his substance abuse, Powers had not availed himself of the opportunity to seek treatment, and members of the community were entitled to relief from his years of alcohol-related misdeeds. We find no abuse of discretion in the trial court's rejection of Powers's impairment as a mitigating factor.

To the extent Powers further challenges his sentence on the basis that the trial court did not accord adequate mitigating weight to his plea, a trial court cannot be said to have abused its discretion in failing to "properly weigh" sentencing factors. *Anglemyer I*, 868 N.E.2d at 491. We therefore reject Powers's challenge on this ground.

Powers additionally challenges his sentence by claiming that the trial court made the impermissible observation that his criminal record represented just the "tip of the iceberg" in terms of his probable history of offenses, many of which he likely had never been held

accountable for. Tr. p. 26. Importantly, the trial court's allusion to this potential history of uncharged offenses was not part of its sentencing statement. In sentencing Powers, the trial court considered only his actual criminal history as an aggravator. This criminal history included two felony convictions for theft, in addition to felony convictions for burglary and operating while intoxicated. We find no abuse of discretion on this point.

To the extent Powers additionally challenges his sentence on the basis of his placement in the Department of Correction, we may review this claim under Indiana Appellate Rule 7(B). *See Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007) ("The place that a sentence is to be served is an appropriate focus for application of our review and revise authority.")

Article VII, Sections 4 and 6 of the Indiana Constitution "'authorize[] independent appellate review and revision of a sentence imposed by the trial court.'" *Anglemyer I*, 868 N.E.2d at 491 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires that we give "due consideration" to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866

N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant's burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

Powers's only argument regarding his placement is that, given his addiction and the Indiana Constitution's goal of reformation, he should have been sentenced to twelve years, with six of those years suspended to probation so that he could seek treatment for his addiction. Were this Powers's first offense, this argument might have more merit. But as the trial court found, Powers has been convicted and sentenced to probation multiple times with little success at reformation. In 1999, Powers received a partially suspended sentence for a theft conviction but had his probation revoked due to a positive drug screen. In 2000, Powers was sentenced to a partially suspended sentence for resisting law enforcement, yet his probation was again revoked. In 2002, Powers was convicted of operating while intoxicated, again received a partially suspended sentence, but again his probation was terminated as unsuccessful. In August of 2006, months prior to the instant burglary, Powers was released from incarceration, was fully aware of his drug problem, yet he nevertheless failed to treat his addiction. By the time of his sentencing for the instant offense, Powers had been incarcerated for nine months and was sober. Given Powers's perpetual failure to treat his addiction outside of incarceration, even when afforded the opportunity, we are unconvinced that the trial court's placing him in the Department of Correction for his fifteen-year sentence is inappropriate.

Having rejected Powers's challenges to his sentence and having determined that his placement with the Department of Correction is appropriate, we affirm the trial court's

fifteen-year sentence for his burglary conviction to be served in the Department of Correction.

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.